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No. 00-1170

In The

Supreme Court of the United States

ROBERT C. HORNKOHL and CITY OF MANISTEE,

Petitioners,

vs.

GALEN BECK, Personal Representative of the Estate of Eugene Beck, and SHARON BECK, Individually,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PARSONS, RINGSMUTH, P.L.C.
By: GRANT W. PARSONS
(P38214)
Attorneys for Respondents
P.O. Box 1710
Traverse City, Michigan
46985-1710
(616) 929-3113

BENDURE & THOMAS
By: MARK R. BENDURE
(P23490)
Attorneys of Record for Respondents
577 East Larned, Suite 210
Detroit, Michigan
48226-4392
(313) 961-1525

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE CONCLUSION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A POLICY OF THE GOVERNMENTAL DEFENDANTS, WHO HAD NO "RESCUE" TEAM, TO ARREST AND INCARCERATE SKILLED PRIVATE DIVERS IF THEY ATTEMPTED TO SAVE THE LIFE OF A PERSON IN IMMINENT DANGER OF DROWNING, THEREBY AFFIRMATIVELY PREVENTING RESCUE, IS VIOLATIVE OF FOURTEENTH AMENDMENT PROTECTIONS.

PARTIES TO PROCEEDINGS

Respondent

Respondent GALEN BECK is the Personal Representative of the Estate of Eugene Beck, whose death was allegedly caused by the unconstitutional policy addressed by the decision of the Court of Appeals for the Sixth Circuit (1a-21a). SHARON BECK is the mother of the decedent. She was physically restrained from attempting to rescue her drowning son. Although the claims of SHARON BECK have been dismissed by the decision of the Court of Appeals (17a), Petitioners have nonetheless identified her as a Respondent in the caption of their Petition, but have not addressed the substance of her claims in their Petition or explained what additional relief they ask this Court to grant them against SHARON BECK.

County of Manistee and Sheriff Haik

The COUNTY OF MANISTEE and its Sheriff, EDWARD HAIK, were co-Defendants of Petitioners in the underlying action. The Court of Appeals upheld summary judgment for Sheriff Haik on qualified immunity grounds (15a-16a). That Court reversed summary judgment for the County, holding that facts developed in discovery were sufficient to show a "policy" (as that term is defined by jurisprudence arising under 42 U.S.C. § 1983) which violated the Fourteenth Amendment rights of the deceased (8a-12a). The County has not sought review of that decision.

PARTIES TO THE PROCEEDINGS - Continued

Petitioners

Petitioner CITY OF MANISTEE has sought review of a similar ruling by which the appellate court reversed the summary judgment which the District Court granted to it (12a-15a). ROBERT C. HORNKOHL, the Director of Public Safety for the City, prevailed on summary judgment, with the Court of Appeals holding that he was protected from § 1983 liability by qualified immunity (15a-16a). Despite having prevailed below, he has joined in the Petition for Writ of Certiorari.

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OPINIONS BELOW

The Opinions of the District Court (24a-50a to the Petition) and United States Court of Appeals for the Sixth Circuit (1a-21a) are both unreported.

BASIS FOR JURISDICTION

Respondents acknowledge, as Petitioners assert, that the Petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The right which Respondents are alleged to have violated is rooted in the Fourteenth Amendment to the United States Constitution, which provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law". The arrest policy involved in this case also implicates the Fourth Amendment (applicable to the States under the Fourteenth), which states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONCISE STATEMENT OF THE CASE

1. Introduction

On January 28, 1995, Plaintiff's decedent,[1] Eugene Beck, fell[2] into the Manistee River in Manistee, Michigan. Within minutes, two highly experienced divers arrived at the scene, fully equipped and prepared to rescue Mr. Beck. However, the City of Manistee (by its Chief of Police, Robert Hornkohl), and the County of Manistee (by Sheriff Haik) had adopted the policy that every non-governmental diver who sought to rescue anyone drowning would be subject to arrest. The City's Detective Sergeant has candidly described that policy, "I am sure having that kind of policy would result in the loss of life". The death of Mr. Beck which resulted from that policy is the subject of this case.

2. The History And Nature Of The Policy To Arrest Private Rescuers

Prior to 1993, there had been three incidents of drowning or near drowning in the Manistee area, all within a relatively short time [Mosak dep., pp. 45-47; R.

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[1] Suit was filed in the name of both the decedent's Estate and Sharon Beck, the decedent's mother. For present purposes, the singular term, "Plaintiff", refers to Eugene Beck, the decedent, or his Estate. The term "Defendants" refers to those sued in the District Court without regard to whether they are Petitioners in this Court.

[2] As the District Court noted [Opinion (R. 188), p. 4, fn. 4], there is some dispute whether the decedent fell, jumped, or was pushed into the water, but this disagreement is immaterial to the legal issues presented.

109, Ex. P].[3] In 1993, a man named Mr. Vadaboncouer drowned in the Manistee River (Krause dep., pp. 4-5; Ex. A). On that occasion, Mr. Krause, a friend of Vadaboncouer, arrived at the scene. Mr. Krause had 20 years of underwater diving experience, was certified in open water diving and advanced diving, and held a CPR license (Krause dep., p. 5). When Krause arrived, City Chief Hornkohl told him he was not allowed to enter the water to save his friend (Krause dep., pp. 6-7). As a result, Vadaboncouer died.

The inadequacy of available rescue services led to a public controversy. In early 1993, the City and County began efforts to review their rescue and recovery practices. The outgrowth was that ***neither*** would provide "rescue" services (the attempt to save the life of one in imminent danger of death by drowning).

By January 14, 1993, the City established that, "Due to the current man-power situation, and because of liability, training, and equipment concerns", the City would not provide "Underwater Rescue/Diving services" (Ex. D). That policy remained in effect at the time of the Beck drowning.

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[3] Exhibit references identify attachments to Plaintiffs' Brief in Reply to the Summary Judgment Motions of the City and Hornkohl [R. 109] and those of Haik and the County [R. 164]. The Exhibits are lettered sequentially; *i.e.* R. 109, Exs. A-T; R. 164, Exs. U-EE). Where the referenced Exhibits are those attached to the City/Hornkohl Brief [R. 60] or the County/Haik Brief [R. 123], they will be referred to as "City Ex. ___" or "County Ex. ___" respectively.

By this time, the City had a "Cold Water Rescue Team" (City Ex. A), comprised exclusively of City employees (¶ 5, p. 2), who "shall not dive under any circumstances" (¶ 2, p. 1). Rather, once the victim "is no longer visible", the Sheriff's team was to be notified, "to stand by in case the victim submerges under the water or below the ice" (*Id.*).

The County read Michigan law[4] as requiring only "recovery" services (pulling dead bodies out of the water), not "rescue" services (saving living people in peril) (Ex. H; Lamunyon dep., p. 22). To avoid what it perceived would be liability exposure, the County decided to confine its activities to "recovery" (Exs. E, F).

Mr. Krause, spurred by the death of his friend, Mr. Vadaboncouer, established the Manistee Search and Rescue Dive Team ("MSRDT") to fill the need for rescue services. This team was consisted of civilian volunteers, experienced in diving and rescue operations (Mosack dep., p. 7). Other members of the MSRDT, besides Mr. Krause, included Fred LaPoint, Michael Mosack and Gordon Cole.

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[4] The operant Michigan statute, M.C.L.A. 51.301, provides:

> "In case any person is drowned in waters within the corporate limits of any city, it shall be the duty of the chief of police of said city, and in case any person is drowned in waters outside the corporate limits of a city, it shall be the duty of the sheriff of the county within which such waters are situated, to use every available means in the recovery of any such body. . . . "

Despite widespread community support for the MSRDT, Sheriff Haik was adamantly opposed to it (Ex. H, Lamunyon dep., pp. 24-25, 39-48). The Sheriff announced that every water scene was considered a "crime scene" (Lamunyon dep., p. 23). He viewed civilian rescue attempts as "interfering in a crime scene", a view that was commonly known to MSRDT members (Lamunyon dep., pp. 23, 39). At several city council meetings, which were typically televised locally, Haik announced that MSRDT members who undertook rescue operations would be criminally prosecuted and jailed (Lamunyon dep., pp. 24, 39, 45, 47, 48, 55-56, 58). This position was formalized by a written document. In this memorandum, from Sheriff Haik to volunteer fire chiefs in the area:[5]

> " . . . Mr. Haik declared that any water accident scene was a crime scene and that if members of the Manistee Search and Rescue Dive Team showed up and attempted to go into the water in an effort to attempt to rescue a person that we would be placed under arrest for impeding a police operation" (LaPoint dep., pp. 132-133).

The City's Detective Sergeant James Grabowski, a former good friend of Haik, was also aware of a memorandum from the Sheriff (Ex. K, Grabowski dep., pp. 24, 49). This document provided that, "anybody entering the water is considered a crime scene and they could – are subject to arrest" (Grabowski dep., p. 44). The witness

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[5] Despite repeated requests, Defendants would not provide this writing during discovery. Although they claim it never existed, when Mr. LaPoint asked for a copy from the Chief of a nearby volunteer fire department, the Chief told him he had a copy and would provide it (LaPoint dep., p. 134).

knew that, "having that kind of policy would result in the loss of life" (*Id.*, p. 48).

The threat to arrest anyone attempting a rescue was directed especially to MSRDT members. It was common knowledge that MSRDT members would be arrested for attempting a rescue (Lamunyon dep., pp. 39-41), because, in Sheriff Haik's view, that would be "stepping on [his] toes" (Mosack dep., p. 48).

To summarize the practice: the City would perform no diving or rescue operations. The County would provide only "recovery" assistance. MSRDT members who attempted a rescue, no matter what the circumstances, would be subject to arrest.

3. The Recognized Time Frame For Rescuing Or Resuscitating Drowning Victims

It is nationally recognized that a drowning victim can be resuscitated for between 45 minutes and an hour after he is submerged (Krause dep., pp. 57-58). To succeed in a rescue, it is necessary to get the victim out of the water within "the golden hour" (*Id.*; Mosack dep., p. 21; LaPoint dep., p. 66).

Respondents presented to the District Court the opinion letter of Dr. Alan Steinman, former Director of Health and Safety for the U.S. Coast Guard, together with scholarly writings on the subject (Ex. AA). The factors in this case favored a successful resuscitation within the one hour period (*Id.*, pp. 1-2).

4. The Drowning Of Eugene Beck

Another man, Mark Stander, and Mr. Beck left the bridge at about 10:07 p.m. Mr. Witting, who saw this as he was driving by, continued to a business around the corner, where he called 911 (Ex. Y, Witting dep., pp. 28-30). Beck was near the middle of the river, illuminated by the parking lot lights of a nearby store (*Id.*, pp. 9, 31), about 100 feet from the shore. The decedent was treading water and yelling to another man (*Id.*). After making the 911 call, Witting went outside, and heard the decedent's yelling continue (*Id.*, p. 30).

Two City police officers, Lindeman and Stuckum, arrived within about 2 minutes of the EMS call (Witting dep., p. 31; City Ex. C, Stockman dep., p. 5). They went to the bridge, and Stuckum arrested Stander as he came out of the water (Stuckum dep., pp. 6-7; City Ex. D, Lindeman dep., p. 13).

Meanwhile, a fisherman advised Lindeman that there was a second man (later identified as Beck) in the water (Lindeman dep., pp. 13-14). Lindeman saw Beck's body in the water. According to the dispatch log,[6] at 10:17

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[6] The Central Dispatch Director, Ms. Griffin, ordered that the taped dispatch transmission regarding the Beck incident be saved (Ex. M, Griffin dep., p. 43). In addition, the City received a request under the Michigan Freedom of Information Act (*Id.*, p. 44). Despite Ms. Griffin's order, a City employee recorded over the original tape. Since no copy was made, the exact contemporaneous communication by Lindeman has been destroyed. In addition, there is considerable doubt about the accuracy of the log, since the times do not coincide with witness testimony and since the log omits communications which witnesses overheard.

Lindeman reported that he "saw the subject go under and not resurface" (*Id.*, p. 14).

Meanwhile, MSRDT members Cole and Mosack overheard the transmissions. Cole went to the scene with his rescue equipment and dive suit within 5 minutes of hearing the Lindeman transmission (Ex. O, Cole Affidavit). Mosack got his equipment, and arrived 6 minutes after hearing a transmission that the man was seen on the surface (Mosack dep., p. 27). He donned his diving equipment within the first minute of arrival (Mosack dep., pp. 22-23). Thus, both civilian divers were ready to begin the rescue operation by 10:24, seven minutes after Lindeman had reported seeing Beck go under. This is confirmed by Mr. LaPoint, who arrived at 10:20 p.m., and saw Mosack and Cole in their wet suits with their equipment at hand five minutes later (LaPoint dep., pp. 62-63).

The U.S. Coast Guard station in Manistee "primarily responds to rescue operations", because "the difference between the rescue of a cold water near drowning victim and a body recovery is the timely notification of available rescue agencies" (Ex. T). It was able to respond to the Beck death scene within two minutes of notification (*Id.*). However, it was not contacted because the City's policy under Haik was not to call the Coast Guard (Griffin dep., pp. 47-49).

Meanwhile, at 10:18 p.m., Lindeman or Stuckum requested that Chief Hornkohl be notified (City Ex. G,

Hornkohl dep., p. 44). The Chief arrived in about 5 minutes (*Id.*); at the time of, or just prior to, the arrival of Cole and Mosack.[7]

Central dispatch had notified the "R5" unit at the City's fire station (Hornkohl dep., pp. 45-46). This unit was manned by Mr. Janowiak and by Mr. LaPoint, a member of the MSRDT.[8] The R5 unit is the medical emergency vehicle which carries specialized water rescue and extraction equipment, as well as the most advanced resuscitation equipment in the City (LaPoint dep., pp. 42-43). Shortly after arriving, Chief Hornkohl ordered LaPoint and the R5 vehicle to leave the scene, where there was no other known resuscitation equipment, expecting to summon R5 only after the body was recovered (Hornkohl dep., pp. 44-48). This was because the City's policy was not to have a dive team and not to allow fire department personnel to dive (*Id.*, pp. 97-99). By now, 20 minutes of the "golden hour" had expired and Mosack and Cole remained ready to act.

The City's policy was not to permit MSRDT to attempt to rescue without Haik's approval. However, Haik was not notified until 10:40 p.m., over one-half hour after Beck entered the water, and more than 15 minutes after Mosack and Cole were prepared to rescue Beck. Haik did not arrive at the scene until 11:00 p.m. (City Ex. F, Haik dep., p. 9, 25). The Sheriff's county divers did not

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[7] Other testimony indicated that Hornkohl did not arrive until 10:31.

[8] LaPoint did not arrive in the R5 vehicle with his diving equipment, but the equipment was in his car, parked at the fire station six blocks away (LaPoint dep., p. 41).

enter the water until 11:05 p.m., about one hour after the initial report (*Id.*, p. 9).[9] Within 14 minutes of entering the water, these divers recovered Beck's body "pretty much below the last seen point" (*Id.*, p. 20; City Ex. B, Kowalkowski dep., pp. 69-70). Apparently believing that resuscitation was still possible, a Coast Guard officer, Mr. Monck, attempted CPR, but these efforts were too late to be successful.

5. Governmental Prevention Of Timely Private Rescue Attempts

Mosack and Cole arrived within a minute or so of each other, no more than seven minutes after the report that the man had been observed going down (Mosack dep., pp. 27-30; Cole dep., p. 21; Cole Affidavit, ¶ 4). They learned where Beck had last been seen and were directed by a police officer to talk to Hornkohl (Mosack dep., pp. 10, 29). They told Chief Hornkohl that they were ready to go in the water (Mosack dep., p. 10).[10] Hornkohl called Sheriff Haik, then announced, "I need you to stand

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[9] According to the log, Mr. Cermack, the County diver, had no contact with central dispatch until 10:31, twenty-four minutes after the original 911 call (Ex. K, Cermack dep., p. 6). The log (Ex. B) reflects that at 10:30, "The County Dive Team Started To Be Called In". When Cermack first heard the dispatch, he was on patrol, without his equipment, 20 miles away (*Id.*, pp. 4-5).

[10] Hornkohl claims he was unaware of any dive team member at the scene (City Ex. G, Hornkohl dep., p. 52), and Cole could not recall talking to Hornkohl. However, other witnesses observed Hornkohl speak with MSRDT members (Grabowski dep., p. 20).

by. Per Sheriff Haik, you're not to go in the water" (Mosack dep., pp. 37-38), and that the Sheriff's department was being notified that they were just to stand by (Mosack dep., p. 10). This was about one-half hour before the County employees went in the water (Mosack dep., p. 11).[11]

Cole then called the Coast Guard, asking for authorization to attempt a rescue (Mosack dep., p. 39). The Coast Guard declined, "[w]e're going with the Sheriff . . . we're letting him make the call" (*Id.*).

If allowed, Cole and Mosack could have effected a rescue attempt within 15 minutes of the report of a person off the bridge (Mosack dep., p. 50). The reason Mosack did not make the rescue attempt was that he had previously been told by Haik, "that if we were to get in the water, basically, we could be charged" (Mosack dep., p. 12). Mosack also knew of Haik's policy against non-sheriff personnel attempting to rescue a person who was drowning (*Id.*, p. 14). Mosack's decision not to rescue Beck was consistent with the practice of MSRDT members not risking prosecution (Lamunyon dep., p. 39).

Mr. Krause, not in diving gear, was also on the scene. He spoke to Mosack and Cole who affirmed that they wanted to attempt a rescue (Krause dep., pp. 52-53). Mosack explained, "They told me the same old bullshit. They just told them to stand by" (*Id.*, p. 52). Feeling

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[11] The District Court indicated that equipment problems with the County boat delayed entry into the water (31a). However, there was testimony suggesting that the malfunctions did not occur until attempts to pull the body aboard (Mosack dep., p. 41).

"shrugged off" in this fashion, Krause saw no reason to stay (*Id.*, p. 54).

Mr. LaPoint spoke with Cole and Mosack the day after the drowning. They told him they were concerned about the threat of arrest and that they had been told by Hornkohl that they could not go in (LaPoint dep., pp. 195-196).

6. The District Court Decision

Following extensive briefing and oral argument, the trial judge issued his summary judgment Opinion (22a-50a). While acknowledging that the constitutional violation asserted by Plaintiffs had been recognized in *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990) (39a-42a), the Court found the facts in this case insufficient to present a constitutional deprivation (42a-43a). This legal conclusion was based on the court's belief that the divers were not physically prevented or threatened with arrest if they attempted a rescue (42a-43a), that Hornkohl made an "objectively reasonable response", and that he, "reasonably could have concluded that permitting Mosack and Cole to attempt to dive would complicate the better equipped efforts of the Sheriff's diving team" (43a).

Even if the government conduct was unconstitutional, the District Court ruled, this would not allow imposing liability on Haik and Hornkohl (43a-45a). In the court's view, they were entitled to qualified immunity, because their actions did not "violate clearly established

statutory or constitutional rights of which a reasonable person would have known" (*Id.*).

The Court also dismissed the state law claims, finding that Haik and Hornkohl's conduct was not "gross negligence" (46a-47a). Concluding that Mrs. Beck had no constitutional right to avoid being restrained when she sought to rescue her son, the suit by Mrs. Beck individually was dismissed as well (48a-50a).

7. The Court of Appeals Decision

At bottom, the appellate court disagreed with the trial court on one principal point. Although the District Court did not disagree with the existence of a core constitutional right (38a-42a), it found the facts insufficient to establish a violation of that right because, in the court's view, Defendants' conduct was reasonable (43a). The Court of Appeals, viewing the facts in a light favorable to Plaintiff (6a), found the evidence sufficient (8a):

> "The plaintiffs also maintain that Eugene Beck was deprived of his life by an irrational government prohibition against private rescue efforts. This claim might prove to be meritorious, we believe, depending on how a jury ultimately assesses the evidence."

a. The Rulings Not Challenged

The appellate court upheld the dismissal of the state law claims and the action of Sharon Beck (17a-21a). Those rulings are not at issue. The controversy involves the claims of the Estate under 42 U.S.C. § 1983.

The Court of Appeals held that there was no constitutional right to government-provided rescue services, hence there could be no liability for the failure of State actors to rescue (7a-8a). Respondents do not quarrel with that proposition.[12]

With regard to the individual Defendants, the Court of Appeals held that there was no binding Supreme Court or Sixth Circuit precedent existing in 1995 "establishing with particularity that actions of the sort attributable to Sheriff Haik and Chief Hornkohl were unconstitutional" (16a). Accordingly, the Court upheld summary judgment to these Defendants on qualified immunity grounds (15a-16a).[13]

As to the City and County, the Court recognized that the actions in issue were undertaken pursuant to a "policy" or "custom" as those terms are used in § 1983 jurisprudence (10a-15a). Neither government entity

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[12] While the appellate court regarded Respondents' argument as including liability for failure to act, their argument was, and is, considerably more narrow (Brief on Appeal, p. 22):

> " . . . Plaintiffs do *not* claim that the City and County may be held liable for the omissive failure to rescue. Rather, Plaintiffs contend that the policies and practices which affirmatively interfered with an impending private rescue attempt violate due process guarantees of the Fourteenth Amendment under the principles of *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990)."

[13] Qualified immunity is a defense available only to individuals sued under § 1983, not a municipality. *Owen v. City of Independence*, 445 U.S. 622; 100 S.Ct. 1398; 64 L.Ed.2d 673 (1980). Thus, the qualified immunity ruling does not avail Petitioner City.

challenges this ruling. The controversy turns squarely on the issue of whether the decedent had an interest protected by the Constitution upon which the governmental policies infringed.

b. Recognition Of A Constitutional Protection

While recognizing no right to rescue by the State, the Court of Appeals did conclude that, "some constitutional limits do exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary government policies". The Court cited the similar case of *Ross*, where the Seventh Circuit held that "a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative" may be regarded as "arbitrarily den[ying] [the plaintiff's decedent] his fourteenth amendment right to life" (9a). Applying the principle of *Ross* to this case, the Court of Appeals reached the following conclusion:

> " . . . [P]ublic safety officials should have broad authority to decide when civilian participation in rescue efforts is unwarranted. If police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt, for instance, it would certainly be permissible to forbid such an attempt. It would not be irrational, similarly, to prohibit private rescue efforts when a meaningful state-sponsored alternative is available. But *Ross* holds that official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is

not available when it counts – and we are constrained to agree".

ARGUMENT

THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE CONCLUSION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT A POLICY OF THE GOVERNMENTAL DEFENDANTS, WHO HAD NO "RESCUE" TEAMS, TO ARREST AND INCARCERATE SKILLED PRIVATE DIVERS IF THEY ATTEMPTED TO SAVE THE LIFE OF A PERSON IN IMMINENT DANGER OF DROWNING, THEREBY AFFIRMATIVELY PREVENTING RESCUE, IS VIOLATIVE OF FOURTEENTH AMENDMENT PROTECTIONS.

1. The Core Proposition That The Fourteenth Amendment Prohibits Affirmative Government Conduct Which Is Unjustified And Causes Death Or Injury Cannot Be Seriously Questioned.

The declaration of constitutional law announced by the Court of Appeals is captured in a single paragraph (8a-9a), the correctness of which cannot be seriously questioned:

> "As noted above, the Due Process Clause of the Fourteenth Amendment prohibits a state from depriving any person of life, liberty, or property without due process of law. Although its text might suggest that the clause was intended simply to require that fair procedures be followed in any such deprivation by the state, the Supreme Court has recognized that the clause also contains a substantive component

> that protects against 'certain government actions regardless of the fairness of the procedures used to implement them.' *Daniels v. Williams*, 474 U.S. 327, 331 (1986). Courts should be 'reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended,' *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992), but some constitutional limits do exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary governmental policies."

A core interest protected by the due process clause is the right to be free from interference with personal security or bodily integrity. See, *e.g.*, *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990); *Nishyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987); *Kneipp v. Tedder*, 95 F.3d 1199 (3rd Cir. 1996); *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).

Since the Fourteenth Amendment serves as a constraint on local government, not private individuals, injuries caused solely by a non-governmental agent are ordinarily not actionable under § 1983. *DeShaney v. Winnebago Social Services*, 489 U.S. 189, 195; 109 S.Ct. 998; 103 L.Ed.2d 249, 258-259 (1989). Even so, a city or county may be held liable where governmental officials were "deliberately indifferent" to those with whom officials had established a "special relationship" or custodial control, where a special danger was apparent. See, *e.g.*, *Jackson v. City of Detroit*, 449 Mich. 420, 430; 537 N.W.2d 151 (1995) (suicide of pre-trial detainee); *Farmer v. Brennan*, 511 U.S. ___; 114 S.Ct. 1970; 128 L.Ed.2d 811 (1994) (housing pre-

op transsexual in general prison population); *Doe v. Claiborne County*, 103 F.3d 495, 506-607 (6th Cir. 1996).

In *DeShaney*, this Court considered governmental inaction ("The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them"; 489 U.S. at 203; 109 S.Ct. 889; 103 L.Ed.2d at 263). If Respondents' claims in the case were predicated simply on the inaction of the City and County, the holding in *DeShaney* would presumably dictate a "no constitutional violation" holding.

Here, however, Respondents complain about the express policies of the City and County which affirmatively prevented the rescue which would have taken place without governmental interference. That critical distinction was noted in *DeShaney*, where the Court took pains to point out that, " . . . the State . . . played no part in [the] creation [of the danger], *nor did it do anything to make him more vulnerable . . . [The State] placed [the victim] in no worse position than he would have been if it not acted at all . . .* " (489 U.S. at 201; 103 L.Ed.2d at 262; emphasis supplied). In the wake of *DeShaney*, it has been recognized that affirmative conduct which increases the danger beyond the level it would be without government involvement may be actionable.

It is now held that a "state-created danger" reflecting deliberate indifference (or the like) to the right to personal security is an actionable constitutional violation. See *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062-1066 (6th Cir. 1998); *Kneipp v. Tedder*, 95 F.3d 119, 1205,

1208-1209 (3rd Cir. 1996); *Ross v. United States, supra* and the cases cited therein.

In the final analysis, the Court of Appeals simply recognized that Government is not allowed to cause the death of its citizens by adopting an illegal arrest policy to assure that petty political "turf" is protected at the cost of human life. The principle that the Fourteenth Amendment prohibits irresponsible death-causing conduct of this nature is not fairly debatable.

2. The Fact-Intensive Issue Of Whether The Government Conduct In A Particular Case Was Sufficiently Blameworthy, Unjustified, Or Arbitrary Does Not Warrant Extraordinary Supreme Court Review.

The disagreement between the courts below was not primarily legal in nature. Rather, the lower courts differed in their characterization of the conduct of the government actors (or, more accurately, how reasonable jurors could characterize that conduct). The summary judgment granted to Defendants in the District Court was based on the trial court's view that Petitioner Hornkohl made an "objectively reasonable response" (43a), while the Court of Appeals concluded that jurors could permissibly find the death-causing conduct arbitrary (9a).

Were it critical to the cert-worthiness of the case, the circuit court view is far more tenable. There is no evidence to support the District Court's view that Hornkohl "attempt[ed] to coordinate rescue efforts" (43a); the Sheriff's policy was to provide *no* "rescue efforts", only

"recovery" services, thus there was no "state-sponsored alternative", as the circuit court correctly noted (9a).

Nor is there any basis for the trial court's surmise that "permitting Mosack to attempt to dive would complicate the better equipped efforts of the Sheriff's diving team." Mosack and Cole were on the scene in their dive suits and were prepared to save Beck's life by 10:24, six minutes before the County team was called, sixteen minutes before Haik was notified, and more than forty minutes before the County divers could enter the water. Plainly Mosack and Cole were ready, willing and able to save Beck's life long before the County personnel even got there.

The District Court was also in error in regarding the MSRDT divers as persons who could reasonably be deemed to be "place[d] . . . in jeopardy". By all accounts, the MSRDT divers were well-trained, experienced, and possessed all the relevant certifications.

It is, minimally, permissible for reasonable jurors to share the view that the Government arrest policy was "arbitrary". The policy of arresting rescuers, without regard to whether there was even any crime, is inconsistent with fundamental Fourth Amendment protections against arrests not based on probable cause. It is likewise arbitrary to prohibit all private life-saving, irrespective of the qualifications of the rescuer, immediacy of impending death, or ease of rescue. Ultimately, the policy was that those in danger of drowning should die rather than infringe on the "turf" of bureaucrats whose own underlings would not themselves try to save human life. This policy may fairly be regarded as arbitrary.

At best, the case presents a close question of fact whether the death-causing policy was sufficiently egregious to violate rights secured by the Fourteenth Amendment. Ultimately, the resolution of delicate issues of fact is for the lower courts (in the summary judgment context) and jury (in the trial context). Certiorari should be denied in accord with the observation found in Rule 10:

> "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

3. The Petition Mischaracterizes The Nature Of The Constitutional Right Identified By The Court of Appeals.

In seeking extraordinary Supreme Court review, Petitioners attempt to portray the Court of Appeals Opinion as extraordinary. In doing so, they overstate considerably the nature and import of the decision below.

Seizing on a caption in the Court of Appeals Opinion (8a), Petitioners claim that the appellate court, "recogniz[ed] an affirmative right to unhindered private rescue services" (Petition, pp. 2, 12). Respondents do not claim that the Constitution required any "affirmative" action by the State. Respondents have never contended, and the appellate court did not hold, that the Constitution guarantees the availability of private rescue services. Nor did the appellate court suggest that government must always allow private rescue attempts under all circumstances.

Quite the contrary. The Court of Appeals found no arguable unconstitutionality in the prevention of a rescue attempt by the decedent's mother (17a, fn. 6). The Court took pains to point out that private rescue attempts may permissibly be limited, "[i]f police officials are not satisfied that would-be rescuers are equipped to make a viable rescue attempt" or "when a meaningful state-sponsored alternative is available" (9a). The notion that the Court of Appeals embraced "an affirmative right to unhindered private rescue attempts" is a straw man of Petitioners' own creation.

The Sixth Circuit characterized the *Ross* decision as one holding that "official action preventing rescue attempts by a volunteer driver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts" (9a). Petitioners suggest that in fact there were "state sponsored rescue services" that were simply "not immediately available" (Petition, p. 12). Likewise, they depict the decision below as one based on "a government decision to await the sheriff's dive team for an underwater rescue effort" (Petition, p. 15).

It is true that the purported "alternative" was, in reality, "not available when it counts." Only in part is this attributable to the fact that no County personnel could be at the scene until after the outermost time for resuscitation had expired. Perhaps more significantly, there were no state-sponsored rescue services ***at all***, since the government policy was not to save human life, or even to allow others to do so, but only to retrieve dead bodies. It is therefore fallacious for Petitioners to argue that the ruling below makes mere delay actionable.

The essence of the appellate court's decision is that the policy here in issue, under the facts of this case, may be viewed by reasonable jurors as so arbitrary and irrational as to cross the "constitutional limits [which] exist on the power of state governments and their political subdivisions to jeopardize human lives through implementation of arbitrary governmental policies" (9a). That ruling is an unremarkable comparison of unique facts to a constitutional right which, at its core, is settled. Petitioners' mischaracterization of the ruling below does not change that truism.

4. The Decision Below Does Not Conflict With Other Decisions.

Petitioners seek certiorari on the ground that the decision below is contrary to those of other circuits (see Petition, pp. 2-3, 15-18). That assertion is inaccurate.

The effort to compare this case to *Hamilton v. Cannon*, 80 F.3d 1525 (11th Cir. 1996), and *Andrews v. Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991) is unavailing. Factually, in each of those cases, there was a government *rescue* service already at the scene or on route at the time of the attempted private intervention [see *Hamilton*, 80 F.3d at 1528; *Andrews*, 934 F.2d at 1269], the very state-sponsored meaningful alternative so conspicuously lacking in this case. Moreover, in *Hamilton*, once the certification of the volunteer was verified, private resuscitation efforts *were* allowed (80 F.3d at 1528). Also, the *Andrews* Court found that case factually distinguishable from *Ross*, a case virtually on "all fours" with this. Thus, the cases are factually different from this, not legally inconsistent with it.

Additionally, the § 1983 issue in both *Hamilton* and *Andrews* focused on the liability of *individual* state actors who, unlike the municipalities in this case, had a "qualified immunity" defense available. Here, in contrast to *Hamilton* and *Andrews*, the municipal corporations, who are not protected by "qualified immunity", have adopted actionable policies. The difference is critical, because the successful qualified immunity defenses in *Hamilton* and *Andrews* presuppose the existence of a constitutional violation, albeit one which was not sufficiently well-established to make individual state actors liable. Those decisions, like that of the District Court here, are consistent with the Court of Appeals' recognition of the existence of a Fourteenth Amendment protection against arbitrary, unjustified, death-causing government policies.

Jackson v. City of Joliet, 715 F.2d 1200 (7th Cir. 1983) also provides no support to Petitioners. That case primarily involved allegations of negligence by officers in failing to take sufficient affirmative rescue action.[14] The Court found no Fourteenth Amendment violation when "state officers [attempt to] . . . assist at an accident [and] the attempt fails because of the negligence or even gross negligence of the officers or their supervisors" (715 F.2d at 1206).

Finally, Petitioners are in error in suggesting that the police chase case of *County of Sacramento v. Lewis*, 523 U.S.

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[14] It was argued in *Jackson* that, by directing traffic around the crash site, the officer deterred private rescue. However, there was no identified person, much less one experienced in rescue, who was shown to have been deterred.

833 (1998) embraces a mechanistic Fourteenth Amendment standard which prohibits only "conduct intended to injure" (Petition, p. 13).[15] In *Lewis*, the Court expressly recognized that the scope of Fourteenth Amendment protection necessarily varies with the circumstances (see 523 U.S. at 850-852). The emergency circumstances of a police chase or prison disturbance, which shape limitations on liability in those contexts, do not water down protection against a pre-formulated illegal arrest policy adopted with cold and calculating knowledge of the likelihood of resultant death.

5. Summary

The substantive due process guarantees of the Fourteenth Amendment, the scope of which are context and fact dependent (section 4, *supra*), minimally protect against government policies which arbitrarily, and unjustifiably, subject would-be rescuers to arrest and incarceration, and consign to death those in danger of drowning (section 1, *supra*). Cases involving similar facts do not differ with this analysis, an analysis which does ***not*** confer an unconditionally unhindered right to private rescue (section 3, *supra*). At bottom, the determination whether, factually, the government policies involved in this case violated the Fourteenth Amendment standard is not for this Court (section 2, *supra*). Rather, it is one to be

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[15] Even if that were the standard, the facts of this case allow recovery. A policy which chooses preventable death over "showing up" the government manifests an intent that death occur to avoid the loss of political "face".

made by a properly instructed jury. Certiorari should be denied so that a trial, and an outcome based on the factual merits of the case, can take place.

Respectfully submitted,

BENDURE & THOMAS

MARK R. BENDURE
(P23490)
Attorneys of Record for Respondents
577 East Larned, Suite 210
Detroit, Michigan
48226-4392
(313) 961-1525

PARSONS, RINGSMUTH, P.L.C.

GRANT W. PARSONS
(P38214)
Attorneys for Respondents
520 South Union Street
P.O. Box 1710
Traverse City, Michigan
49685-1710
(616) 929-3113

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